

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DARNELL ASHFORD,

Defendant-Appellant.

UNPUBLISHED

October 23, 2007

No. 271925

Wayne Circuit Court

LC No. 06-001990-01

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to three to ten years in prison for the assault with intent to do great bodily harm conviction, and five years in prison for the felony-firearm, second offense, conviction. We affirm.

I. FACTS

Defendant's convictions arise out of a shooting that occurred on November 11, 2005. The victim, Anthony Bush, was leaving Aleta Taylor's house, after a visit to retrieve some of his clothes, when he was shot in the leg. Bush was trying to find a ride, when he saw a van parked at the curb; he knew the owner, so he approached the van to ask for a ride. Defendant was sitting in the passenger seat and told Bush to get away from the van. Bush stepped back, and defendant told him to keep walking. After Bush asked if he had done anything to defendant, defendant got out of the van and went to his car. Bush repeated that he had never done anything to defendant; defendant then removed a gun from the car and shot Bush in the right leg just below the knee. Defendant jumped in his car and left, and Bush dragged himself back into Taylor's house to get help. Bush later called defendant on his cell phone to ask why defendant shot him.

When the police arrived, Bush stated that David shot him. Bush did not give David's last name to the police, but he was able to give a description of David and the type of weapon used. Bush also said that David was in a blue car and described the general area where David could frequently be found. Based on the information received from witnesses at the scene, the police went to another apartment complex. And after speaking with a woman there, the police identified defendant as a possible shooter in the incident.

At the preliminary examination, Bush testified to the facts stated above and identified defendant as David Ashford, whom Bush knew from drug dealings around the neighborhood. However, he was unable to repeat his testimony at the trial. At trial, Bush remembered being shot but could not recall who shot him. He could not remember writing a statement to the police and reading his statement did not refresh his recollection. He testified that he was receiving psychiatric therapy and had been taking medication for depression. Bush admitted that he did not want to testify at the trial, but he also stated that nobody had talked to him about testifying or threatened him. Bush testified that he knew a man named David, but he did not see David in the courtroom. Bush did not remember testifying at the preliminary examination and reading the transcript from the preliminary examination did not refresh his recollection.

After Bush testified, the prosecution moved for admission of his preliminary examination transcript on the basis that he was unavailable. The trial court concluded that, even though Bush was physically present, he was considered unavailable because his answers clearly reflected that he had no recollection and no memory of the event, so the transcript of his prior testimony could be read into evidence. The trial court also concluded that because Bush had no recollection of testifying at the preliminary examination, the prosecution was required to present testimony that Bush had testified on the date in question. Bobbi Dixon, a victim's advocate for the Wayne County Prosecutor's Office, testified that she met with Bush on February 14, 2006, when he testified at the preliminary examination, that victims are not required to present identification before they testify, and that she saw Bush testify at the preliminary examination. After Dixon testified, Bush's preliminary examination testimony, including the cross-examination, was read into evidence.

II. ADMISSIBILITY OF EVIDENCE

Defendant argues, both through his counsel and in his Standard 4 brief, that the trial court erred in allowing Anthony Bush's testimony from the preliminary examination to be read into evidence at trial [TEXT OMITTED]. We disagree.

A. Standard of Review

"In order to preserve the issue of the improper admission of evidence for appeal, a party generally must object at the time of admission." *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). In addition, the objection at trial must be on the same ground as that asserted on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004).

Defense counsel expressed concern that the person who testified at the preliminary examination may not have been Bush but did not object to the admission of the transcript testimony on any other grounds. Therefore, this issue is not fully preserved for review. Unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture: (1) an error must have occurred, (2) the error must be clear or obvious, (3) and the error must have affected substantial rights, meaning it affected the outcome of the trial. *Id.* at 763.

B. Analysis

Michigan Rule of Evidence 804(b)(1) excludes from the hearsay rule former testimony of an unavailable witness “if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination.” *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). A witness who “has a lack of memory of the subject matter of the declarant’s statement” is an unavailable witness. MRE 804(a)(3). The similarity of the issues at each proceeding determines whether a party had a similar motive to develop the testimony. *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007).

Bush was an unavailable witness for the purposes of MRE 804. Bush remembered being shot but could not recall who shot him. Bush did not remember writing a statement to the police and reading his statement did not refresh his recollection. Bush testified that he was receiving psychiatric therapy and had been taking medication for depression. Bush testified that he knew a man named David, but he did not see David in the courtroom. Bush did not remember testifying at the preliminary examination, and the transcript from the preliminary examination did not refresh his recollection. Bush’s testimony from the preliminary examination was admissible because it was from another hearing of the same proceeding, defendant had a similar motive to develop the testimony because the issue at each proceeding was whether defendant was the person who shot Bush, and defense counsel cross-examined Bush. *Farquharson, supra* at 272.

The admission of Bush’s former testimony also did not violate defendant’s confrontation right. The United States and Michigan Constitutions guarantee a criminal defendant the right “to be confronted with the witnesses against him.” US Const, Am VI; Const 1963, art 1, § 20. The right of confrontation applies to all witnesses against the defendant who bear testimony. *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The purpose of this right is to give an accused the opportunity to cross-examine witnesses against him. *Bruton v United States*, 391 US 123, 126; 88 S Ct 1620; 20 L Ed 2d 476 (1968).

The right to confrontation guarantees the defendant the opportunity for cross-examination but does not guarantee that the cross-examination be effective. *United States v Owens*, 484 US 554, 559; 108 S Ct 838; 98 L Ed 2d 951 (1988). Therefore, where a witness claims to remember nothing at trial, a defendant’s right of confrontation is not violated by the admission of former testimony. *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). A witness may be considered available for cross-examination for purposes of the Confrontation Clause, and at the same time, unavailable for purposes of MRE 804. *Chavies, supra* at 284. Although Bush claimed not to remember his former testimony, he was present at trial and available for cross-examination, but defense counsel elected not to ask any questions. Bush was cross-examined at the preliminary examination.

Defendant’s contention that Detroit Police Officer Alfred Thomas’s testimony should have been stricken from the record as testimonial is without merit. When Thomas arrived at the scene, Bush told Thomas that it was David who shot him, and he gave a description of David, the type of weapon used, that David was in a blue car, and the general area where David frequents. A testimonial statement of a witness who does not appear at trial is admissible only where the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford, supra* at 59. Bush did appear in court, but was declared unavailable due to memory loss. Defendant did have a prior opportunity to cross-examine Bush.

Finally, defendant's argument that Bush's statement was also inadmissible under MRE 801(d)(1) is without merit. First, the trial court did not admit the testimony into evidence under MRE 801. Second, the testimony could have been admitted under MRE 801(d)(1)(A) or MRE 801(d)(1)(C). A statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" MRE 801(d)(1)(A). *Chavies, supra* at 281. Bush testified at trial, was subject to cross-examination concerning his prior testimony, his former testimony identifying defendant as the shooter was inconsistent with his trial testimony, and the former testimony was given under oath at the preliminary examination. Therefore, Bush's preliminary examination testimony would have been admissible as nonhearsay.

In addition, a prior statement is not defined as hearsay where the prior statement is one of identification, and the witness is available for cross-examination. MRE 801(d)(1)(C); *People v Malone*, 445 Mich 369, 376-377; 518 NW2d 418 (1994). The rule "does not require laying a foundation other than that the witness is present and found to be available for cross-examination." *Malone, supra* at 377. Therefore, Bush's identification of defendant as the person who shot him was also admissible as nonhearsay under MRE 801(d)(1)(C).

III. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that the evidence presented was insufficient to convict him of assault with intent to do great bodily harm and felony-firearm. We disagree.

A. Standard of Review

A sufficiency of the evidence claim is reviewed de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002).

B. Analysis

Assault with intent to do great bodily harm is a specific intent crime that requires: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Here, there is sufficient evidence to conclude that defendant shot at Bush and intended to do great bodily harm to him.

At the preliminary examination, Bush identified defendant as David Ashford, whom he knew from drug dealings in the neighborhood. Bush saw a van parked at the curb and knew the owner, so he approached the van to ask for a ride. Defendant was sitting in the passenger seat and told Bush to get away from the van. Bush stepped back, and defendant told him to keep walking. Bush asked if he had done anything to defendant, and defendant got out of the van and went to his car. Bush repeated that he had never done anything to defendant. Defendant took a gun out of the car and shot Bush in the right leg, just below the knee. Defendant jumped in his

car and left. Bush told the police at the scene that it was David who shot him. At the time of the preliminary examination, Bush had nine pins in his leg and a halo on his leg. Viewing the direct and circumstantial evidence in the light most favorable to the prosecution, it was reasonable for the jury to conclude that defendant had a gun, that he fired the gun in the direction of Bush, and that he had the intent to do great bodily harm.

Felony-firearm is an offense covering a “person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony. . . .” MCL 750.227b; *People v Guiles*, 199 Mich App 54, 58; 500 NW2d 757 (1993). Bush testified that defendant took a gun out of the car and shot Bush in the right leg. Therefore, because there was sufficient evidence to find defendant guilty of assault with intent to do great bodily harm, this offense could serve as the underlying felony for the felony-firearm conviction. *People v Wilson*, 230 Mich App 590, 593; 585 NW2d 24 (1998), citing *Guiles*, *supra* at 59.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette